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P&G Case 8169M

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In the application of :
Michael Dean McCutchan : Confirmation No. 3927
Serial No. 09/905,540 : Group Art Unit 1761
Filed July 13, 2001 : Examiner D.E. Becker

For A KIT CONTAINING A SNACK FOOD AND DIP-CONDIMENT

APPELLANT'S BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Dear Sir,

This Appeal Brief is submitted in support of the Notice of Appeal filed on March 31, 2004 setting a two-month period for response.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio. The Inventor who is Michael Dean McCutchan assigned his interest to The Procter & Gamble Company which was recorded on October 4, 2001, reel 012230, frame 0862.

RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences known to the Appellants, or known to Appellants' legal representative that will directly affect, be directly affected by, or that will have a bearing on the Board's decision in the present appeal.

STATUS OF CLAIMS

Claims 1, 3, 5, 6 and 17-20 are pending and stand rejected. A copy of these claims, which are being appealed, appear in Appendix I herein.

STATUS OF AMENDMENTS

No amendments have been submitted after the final office action dated January 14, 2004.

SUMMARY OF THE INVENTION

The present invention relates to a kit for containing both a plurality of snack pieces and a dip-condiment in a space efficient package system. The kit includes a canister, a plurality of snack pieces contained within the container, wherein at least one of the snack pieces have a projected area greater than about 1300 mm², a tub attached to the container, and a dip condiment held within said tub. This kit has a space efficiency greater than about 0.1 g/cm³. (Appellant's specification, page 4, lines 5-10).

The present invention also relates to a kit that includes a container, which contains the plurality of snack pieces in a nested arrangement and a tub connected to the container, which contain the dip-condiment. (Appellant's specification, page 4, lines 12-14).

In a further embodiment of the present invention, the kit comprises a container, a plurality of snack pieces contained with the container and a tub connected to the container. At least one of the snack pieces contained within the container has an edge-to-edge linear dimension greater than at least about 20 mm. Also, the kit has a space efficiency that is greater than about 0.15 g/cm³. (Appellant's specification, page 4, lines 16-20).

In still a further embodiment of the present invention, the kit comprises a canister having a bottom wall and at least one side wall attached to the bottom wall, and an opening defined by the side wall and disposed at an end opposite the bottom wall. The kit also includes a plurality of snack pieces contained within the canister, a tub attached to the container and a dip-condiment held within the tub. This kit has a has a space efficiency greater than about 0.15 g/cm³ and a chip to dip-condiment net weight ratio less than 2. (Appellant's specification, page 4, lines 21-28).

ISSUES

Appellants present the following issue for consideration on appeal:

- I. Whether the Examiner's objection to Appellants' information disclosure statement is proper?
- II. Whether the rejection of Claims 1, 3, 6 and 17-19 under 35 U.S.C. § 103(a) as being unpatentable over Snack-a-Dip [sample] in view of Yan Yan Snacks Meiji [sample] and Doritos Dippas Chips & Salsa [Table 1 of Appellants' specification] is proper?
- III. Whether the rejection of Claims 5 and 20 under 35 U.S.C. § 103(a) as being unpatentable over Snack-a-Dip [sample] in view of Yan Yan Snacks Meiji [sample] and Doritos

Dippas Chips & Salsa [Table 1 of Appellants' specification] in further view of Bezek, et al. (U.S. Patent No. 6,472,007) is proper?

GROUPING OF CLAIMS

Claims 1, 3, 5, 6 and 17-20 stand or fall together.

ARGUMENTS

I. Whether the Examiner's objection to Appellant's information disclosure statement is proper?

In the office action, the Examiner states that the information disclosure statement (IDS) fails to comply with the provisions of 37 CFR §§ 1.97, 1.98 and MPEP § 609 because the non-patent literature references do not disclose a publication date. In previous office actions the Examiner stated that in order to speed along prosecution, it would be assumed by the Examiner that the publication dates of these references (namely, the snack samples provided by Appellant and listed in his Table 1 of the specification) were sometime before the filing date of this application since they are described in the specification.¹ The Examiner further notes that this would equate to either 35 U.S.C. § 102(a) or 102(b) publication dates.²

Appellant respectfully notes that although the Examiner has declared Appellant's IDS to be non-compliant, the Examiner has in fact considered all of the non-patent literature references, their alleged deficiencies notwithstanding. This is noted by 1) the Examiner's initialing of each of the non-patent literature references, 2) the Examiner's own statement of use of the references, and 3) the actual use of the references as is recounted in the Examiner's rejections.

Appellant also points out that by considering the references in Appellant's information disclosure statement, the Examiner has in fact duly considered Appellant's IDS. 37 CFR § 1.98(i) clearly states that if an information disclosure statement does not comply, it should be placed in the file but will not be considered by the Office. Although the Examiner has said that Appellant's IDS does not comply, his actions run counter to that statement since he has duly considered and in fact used Appellant's samples in his rejections against Appellant's claims. As demonstrated by the Examiner's due consideration, the omission of the specific release dates has not materially affected the Examiner's consideration on patentability.

¹ Examiner's Office Action, October 2, 2003, pages 5 and 6.

² Id.

Appellant further argues that he has submitted all information known to be material to patentability by the submission of the samples as is. According to 37 CFR § 1.56(a), all information known to be material to patentability must be submitted to the Office. Herein, Appellant has submitted the snack samples in good faith without knowing the respective company-held release dates of the various products. Appellant submitted the snack samples because Appellant knew of their existence prior to Appellant's non-provisional patent application filing date. In good faith, Appellant submitted the snack samples as an admission that their existence pre-dated Appellant's non-provisional filing date. By such submission, Appellant asserts that he has satisfied the requirements of 37 CFR § 1.56(a), 1.97, 1.98 and MPEP § 609.

Appellant also notes that Appellant, Appellant's Attorney and Appellant's Assignee are unable to provide the "publication" dates of the non-patent references because each of the references is a sample of competitive product having its origin outside of the control of, in particular, Appellant's Assignee, namely, Procter & Gamble. Further, neither Appellant, Appellant's Attorney or Appellant's Assignee are privy to the internal release dates of competitive product. Those release dates are solely within the control of the respective companies' marketing the products. Appellant therefore contends that not having the specific release dates does not make their IDS deficient nor does it materially impact patentability or the Examiner's determination thereof.

As a solution, the Examiner has suggested that Appellant call the respective companies to inquire as to the dates of first market of the respective products.³ Also, the Examiner states that this information is not internal information since it is merely the date when the company first started marketing or selling the product.⁴

Appellant respectfully disagrees with the Examiner's assertions and notes that the Examiner's solution is unworkable. First, Appellant points out that while they may be able to call a company's "hotline", to the extent that one actually exists, no company is under any compulsion to provide the requested data to Appellant. Appellant also points out that the information is most certainly "internal" to a company where the company resides in near exclusive control of the information, which is demonstrated by the Examiner's suggestion to "call these companies" to get the information.

Therefore, Because Appellant's IDS has been duly considered by the Examiner in direct contravention of 37 CFR § 1.98(i) and because Appellant has met his responsibilities under the above-noted rules, Appellant respectfully requests reconsideration of their IDS as is and the removal of the Examiner's objection thereto.

³ Id.

⁴ Id.

II. Whether the rejection of Claims 1, 3, 6 and 17-19 under 35 U.S.C. § 103(a) as being unpatentable over Snack-a-Dip [sample] in view of Yan Yan Snacks Meiji [sample] and Doritos Dippas Chips & Salsa [Table 1 of Appellants' specification] is proper?

Claims 1, 3, 6 and 17-19 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Snack-a-Dip [sample] in view of Yan Yan Snacks Meiji [sample] and Doritos Dippas Chips & Salsa [Table 1 of Appellants' specification].

The Examiner states that Snack-a-Dip teaches a kit comprising a canister containing a plurality of snack pieces, an attached tub containing a dip condiment, the kit having a space efficiency of about 0.126 g/cm^3 , the canister having a sidewall, bottom wall, and top opening; a snack piece to dip ration of 1.5; and a removable lid. The Examiner further states that Snack-a-Dip does not disclose a space efficiency greater than 0.20 and an area of 1,900 to 10,000 mm^2 .

Regarding Yan Yan Snacks Meiji (Yan Yan), the Examiner states that it teaches a kit comprising a canister containing snack pieces, a tub containing dip condiment, and a space efficiency of 0.228. The Examiner then concludes that it would have been obvious to one of ordinary skill in the art to incorporate the space efficiency of Yan Yan into the kit of Snack-a-Dip since both were directed to kits containing snack pieces and dip condiments.

Next, the Examiner asserts that Doritos Dippas is incorporated because it teaches a chip and dip package which contains snack pieces with an average area of 3700 mm^2 . The Examiner concludes that "it would have been obvious to one of skill in the art to incorporate the snack piece size of Doritos Dippas Chips & Salsa into the invention of Snack-a-Dip since both are directed to chip and dip kits, since Snack-a-Dip already included chips, and since the larger chips of Doritos Dippas Chips & Salsa would have provided a larger area to grip the chip and thus reduce the chance of getting dip on one's fingers."

To establish a prima facie case of obviousness, all the claim limitations must be taught or suggested by the prior art.⁵ Obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art.⁶

Appellants respectfully disagree with the Examiner. First, Appellants note that the Examiner's conclusion as to obviousness is misstated and in its present form is improper. The Examiner states that "it would have been obvious to one of skill in the art to incorporate the snack

⁵ *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974).

⁶ *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988); *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

piece size of Doritos Dippas Chips & Salsa into the invention of Snack-a-Dip since both are directed to chip and dip kits, since Snack-a-Dip already included chips, and since the larger chips of Doritos Dippas Chips & Salsa would have provided a larger area to grip the chip and thus reduce the chance of getting dip on one's fingers." [Emphasis added.] Appellant asserts that this statement is improper.

The Examiner's original rejection is as to Snack-a-Dip in view of Yan Yan Snacks Meiji and Doritos Dippas Chips & Salsa. In the Examiner's analysis and conclusion, he completely leaves out Yan Yan as an reference element of the rejection. Appellant contends that Yan Yan is an important part of that analysis and conclusion and should have been properly included into the Examiner's rejection as originally stated. Instead, the Yan Yan reference is apparently dropped out by the Examiner.

In fact, Appellant contends that the proper inclusion of Yan Yan causes the Examiner's rejection to be unfounded. Snack-a-Dip provides small tortilla chips in a long, wide cylindrical container with a tub of dip secured at the top of the container. Yan Yan provides a slender, conical container having a small recessed portion at the mouth of the container that serves as a holder of chocolate--a highly viscous substance when at least partially liquefied. The snacks of Yan Yan are rolled, cylindrical bread or wheat based sticks with sesame seeds applied thereto. Yan Yan's snacks have very little surface area because of their geometry--i.e., rolled, cylindrical bread sticks. Doritos Dippas are curved corn-based snack chips. The Dippas come in a bag without any sort of dip attachment. The dip is sold separately in glass jars.⁷

Appellant contends that one of skill in the art would not be led by the references themselves or by knowledge known by those of in the art to combine Snack-a-Dip, Yan Yan and Dippas together. First, Appellant asserts that the combination of Snack-a-Dip, Yan Yan and Dippas would not produce a larger grip area for the snack since Yan Yan would force the combination to now become rolled and cylindrical--thus, immediately both 1) reducing the surface area of the snack pieces and 2) changing the important geometric configuration of the snack pieces from one that is open to one that rounded and cylindrical in every direction.

This immediate reduction in surface area, Appellants contend, would steer one of skill in the art away from combining these three samples together. The fact that the Examiner improperly tries to base his analysis and conclusion on just the Snack-a-Dip and Dippas samples rather than all three of the samples as originally presented (i.e., Snack-a-Dip, Yan Yan, and Dippas) bolsters the fact that one of skill in the art would not be led to combine all three of the samples to produce a snack chip with an increased surface area for dipping.

⁷ Website: <http://walkers.corpex.com/cr15p5/products.asp?snacktypeid=34>

Furthermore, since Yan Yan is not a snack chip, Appellants contend that one of skill in the art would be persuaded against combining the teachings of Snack-a-Dip, Yan Yan and Dippas since Snack-a-Dip and Dippas are so clearly snack chips having surface areas which are open and on which to hold dip. Yan Yan only provides a rolled, curved surface that will not properly hold most dips, salsas or sauces--only the most viscous types of dips or sauces will adhere; e.g., Yan Yan's highly viscous chocolate sauce. Appellant therefore contends that the surface area of Yan Yan cannot hold a much less viscous substance like Snack-a-Dip's dip or Dippas' salsa which is primarily water based and sold in a separate container from Doritos Dippas.

Thus, Appellant does not believe that the Examiner has properly provided a prima facie case of obviousness against Appellant's claims. In fact, Appellant again contends that the Examiner's rejection is not only improper but improperly stated, analyzed and concluded for all of the reasons noted above. Appellant therefore requests reconsideration and allowance of Claims 1, 3, 6 and 17-19 over the Examiner's 35 U.S.C. § 103(a) rejection.

III. Whether the rejection of Claims 5 and 20 under 35 U.S.C. § 103(a) as being unpatentable over Snack-a-Dip [sample] in view of Yan Yan Snacks Meiji [sample] and Doritos Dippas Chips & Salsa [Table 1 of Appellants' specification] in further view of Bezek, et al. (U.S. Patent No. 6,472,007) is proper?

The Examiner adds Bezek '007 to the previously discussed samples because Bezek '007 teaches a container that may be created in a triangular form and that may house nested triangular tortilla chips.

Despite the addition of Bezek '007, Appellant asserts that the Examiner has failed to provide a prima facie case of obviousness against Appellant's claims. First, as noted above, one of skill in the art would not be led to form the Snack-a-Dip/Yan Yan/Dippas combination because such a combination would force the surface area of the snack pieces to become smaller and also because the change of geometry of the snack pieces (i.e., moving from an open surface to a rolled, cylindrical surface) immediately limits the kinds of dips applicable to the now newly constructed snack piece. As noted above, in the Snack-a-Dip/Yan Yan/Dippas combination only the most viscous dips with the ability to cleave to the outside of a rolled, cylindrical structure would have the shear strength to hang onto the outside of the rolled, cylindrical snack piece.

The addition of Bezek '007 to the Snack-a-Dip/Yan Yan/Dippas combination does not cure these great deficiencies, because Bezek '007 primarily teaches a package for the housing of a number of snack pieces or chips. Though Bezek '007 mentions, in one line, the possibility of housing a triangular, stacked snack chip, Bezek '007 presents no dimensions and no teachings that would cause

or motivate one of skill in the art to take Bezek's one line teaching and apply it with the Snack-a-Dip/Yan Yan/Dippas combination to produce Appellant's invention.⁸

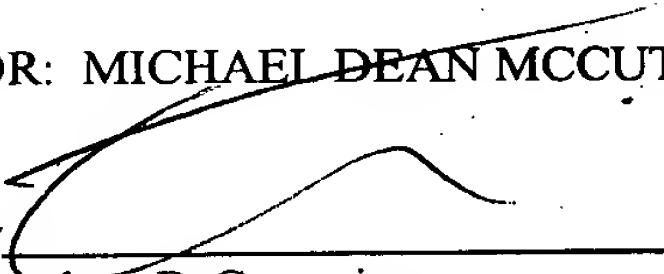
Appellant therefore contends that the Snack-a-Dip/Yan Yan/Dippas/Bezek combination does not teach Appellant's invention and respectfully requests reconsideration and allowance of Claims 5 and 20 over the Examiner's 35 U.S.C. § 103(a) rejection.

⁸ Bezek, et al. (U.S. Patent No. 6,472,007), col. 7, line 15: "For example, a triangular geometry could be used for the receptacle in order to accommodate stackable tortilla chips."

SUMMARY

For the reasons set forth above, Appellants submit that the Examiner has not set forth the proper evidence for either the objection to the information disclosure statement or the 35 U.S.C. § 103(a) rejections. Accordingly, reversal of the Examiner's findings of unpatentability is respectfully requested.

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October 14, 2004
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APPENDIX I

Appealed Claims: Application No. 8169M

1. A kit for containing both a plurality of snack pieces and a dip-condiment, said kit comprising:
 - a canister;
 - a plurality of snack pieces contained within said canister, wherein the snack pieces have an average projected area ranging from about 1900 mm² to about 10,000 mm²;
 - a tub attached to said canister; and
 - a dip condiment held within said tub;wherein said kit has a space efficiency greater than about 0.15 g/cm³.
3. A kit according to claim 1, wherein said kit further comprising a snack piece to dip net weight ratio less than about 2.
5. A kit according to claim 1, wherein said plurality of snack pieces are in a nested arrangement.
6. A kit according to claim 4, wherein said container has a bottom wall, at least one side wall attached to said bottom wall, an opening defined by said at least one side wall and disposed at an end opposite said bottom wall.
17. A kit for containing both a plurality of snack pieces and a dip-condiment, said kit comprising:
 - a canister having a bottom wall and at least one side wall attached to said bottom wall, an opening defined by said at least one side wall and disposed at an end opposite said bottom wall;
 - a plurality of snack pieces contained within said canister, the snack pieces having an average projected area ranging from about 1900 mm² to about 10,000 mm²;
 - a tub attached to said canister; and
 - a dip condiment held within said tub;wherein said kit has a space efficiency greater than about 0.15 g/cm³ and a snack piece to dip-condiment net weight ratio less than 2.
18. A kit according to claim 17, wherein said kit has a space efficiency greater than about 0.2 g/cm³.
19. A kit according to claim 17, further comprising a removable lid attached to said side wall of said canister and covering said opening.
20. A kit according to claim 19, wherein said kit has a substantially triangular shape.